No. 13-115

In the Supreme Court of the United States

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents seek compensatory and punitive damages from two Secret Service agents who, while protecting President George W. Bush, allegedly required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine, thus causing the group to be less than one block farther away from the alley than a group of pro-Bush demonstrators who were not adjacent to the alley at the outset. The court of appeals held that petitioners are not entitled to qualified immunity from respondents' claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment. Pet. App. 31a-50a. Eight judges who dissented from the denial of rehearing en banc recognized that the decision is "a textbook case-study of judicial second-guessing of the on-the-spot judgment that Secret Service agents * * *

made about security needs." *Id.* at 8a. The dissenters also explained that the decision "commits many familiar qualified immunity errors," and they expressed understandable "concern[]" that this case would extend the Ninth Circuit's "storied losing streak" in qualified-immunity cases. *Id.* at 22a. Respondents' brief opposing certiorari does not alleviate those concerns. In light of the particular threats that the decision below poses to the sensitive and important work of the Secret Service in protecting high-level officials, this Court should grant plenary review or summarily reverse.

A. The Court Of Appeals Defined The Right Against Viewpoint Discrimination At A High Level Of Generality, Without Accounting For The Context

This Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (citation omitted); see Pet. 14-15 (citing five additional cases between 1987 and 2012). Yet the decision below repeated that all-too-common mistake. It defined the right at issue as the right to be free of "viewpoint discrimination in a public forum," Pet. App. 49a—an abstract proposition that is of no more "help in determining whether the violative nature of particular conduct is clearly established" than the truism that "an unreasonable search or seizure violates the Fourth Amendment." *Al-Kidd*, 131 S. Ct. at 2084. The court should, instead, have considered whether it would have been "clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

1. The court of appeals held that respondents have advanced a plausible claim of "facial viewpoint discrimina-

tion" simply because "the anti-Bush protestors * * * were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President." Pet. App. 38a. Yet, as the petition explained (at 16-20), the general rule against "viewpoint discrimination" does not *clearly establish* that the relatively trivial disparate impact in this case violated the First Amendment.

In framing their discussion, respondents characterize the anti-Bush group as having been "similarly situated" (Br. in Opp. 10, 12) with the pro-Bush group, which is demonstrably inconsistent with their own allegations. Respondents conspicuously choose to focus on the two groups' relative distance from *the motorcade route* down Third Street. *Id.* at 12-13. But respondents allege that the demonstrators were not moved until after the motorcade had arrived. *Id.* at 4; Pet. App. 175a-177a. By that time, the relevant point of reference was no longer Third Street but the outdoor patio where the President was dining. As the petition demonstrated (on the basis of respondents' own map), the anti-Bush group was closer to, and less screened from, the patio than was the pro-Bush group—and that was true both while the anti-Bush group was between Third and Fourth Streets and after it had been moved across Fourth Street. Pet. 17 & n.4; Pet. App. 212a.[1] Respondents have not even attempted to

[1] Respondents are equivocal about the court of appeals' repeated reliance (Pet. App. 37a-38a, 44a, 47a, 48a) on the effect that the dinner-time move had on their distance from the President's post-dinner motorcade route. At one point, they assert that they "do not claim that they should have been returned" to the side of Third Street before the motorcade left the Inn. Br. in Opp. 26. Elsewhere, however, respondents accuse petitioners of ignoring the allegation that "the anti-Bush protestors were *kept away*" from the motorcade route. *Id.* at 24 (quoting Pet. App. 44a) (emphasis added).

rebut that demonstration, which is fatal to their claim to have been similarly situated.

Respondents also exaggerate the purported effect of the move, contending that, at their new location, the anti-Bush "protest message could not [be] heard by the President during dinner." Br. in Opp. 5; see *id.* at i (their "message could neither be seen nor heard"). Again, their allegations do not support that statement. Indeed, as explained in the petition, the court of appeals' first decision expressly found that respondents' First Amended Complaint failed to allege they had been "moved to an area where the President could not hear their demonstration," and respondents did not remedy that deficiency in the now-operative Second Amended Complaint. Pet. 18 n.5 (quoting *Moss* v. *United States Secret Serv.*, 572 F.3d 962, 971 (9th Cir. 2009)); see Pet. App. 177a-179a. Even the decision below did not credit the proposition that the anti-Bush group was moved beyond the President's earshot. Instead, the court of appeals went beyond respondents' allegations to "infer" that the anti-Bush group had been rendered "less able to communicate effectively with the President." *Id.* at 37a.

2. The court of appeals identified no case suggesting, much less clearly establishing, as of 2004, that actionable viewpoint discrimination inheres in causing a group with one view to be less than one block farther away from the President than a group with an opposing view that is itself nearly a block away. Pet. 17-18 & n.5. Respondents cite (Br. in Opp. 15-16, 19, 21-22) cases that involved prohibiting expressive activity altogether in an area[2] or entirely

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[2] *Lederman* v. *United States*, 291 F.3d 36, 39, 46 (D.C. Cir. 2002) (ban on demonstrations on certain sidewalks near the Capitol building); *Pursley* v. *City of Fayetteville*, 820 F.2d 951, 952 (8th Cir. 1987)

excluding persons of one view from an event.[3] But respondents identify no instances where the First Amendment was held to have been violated when security considerations merely caused two groups of different views to end up at marginally different distances from a public official (especially when the groups were not even similarly situated at the outset).[4]

3. Ultimately, respondents' brief in opposition never squarely embraces the court of appeals' facial-viewpoint-discrimination holding, which remains in serious tension with the Tenth Circuit's conclusion that "[t]he First Amendment does not impose upon public officials an af-

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(ban on all pickets and demonstrations in front of residences or dwelling places).

[3] *Metro Display Adver., Inc.* v. *City of Victorville*, 143 F.3d 1191, 1194 (9th Cir. 1998) (attempt to ban pro-union displays in bus shelters); *Mahoney* v. *Babbitt*, 105 F.3d 1452, 1455-1456 (D.C. Cir. 1997) (concededly viewpoint-based decisions to deny permits to certain demonstrators who wished to protest along Inaugural Parade route); *Pledge of Resistance* v. *We the People 200, Inc.*, 665 F. Supp. 414, 415-417 (E.D. Pa. 1987) (attempt to ban peaceful demonstration activities by anti-war protestors and civil rights groups in areas of bicentennial festivities in Philadelphia); *Butler* v. *United States*, 365 F. Supp. 1035, 1037-1038 (D. Haw. 1973) (removal or exclusion of protestors from Air Force base during event to greet President Nixon and Japanese premier); *Sparrow* v. *Goodman*, 361 F. Supp. 566, 583-584 (W.D.N.C. 1973) (exclusion of various likely protestors from event in the Charlotte Coliseum), aff'd *sub nom. Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974).

[4] Respondents cite (Br. in Opp. 22) one case that involved the arrest of a protestor who tried to carry a sign outside of a designated "pro" or "anti" demonstration zone in close proximity to a presidential speech. See *Johnson* v. *Bax*, 63 F.3d 154, 156 (2d Cir. 1995). The court there, however, did not address the viability of the plaintiff's First Amendment claim, ruling only that the district court had erroneously treated the complaint as alleging false-arrest and false-imprisonment, but not First Amendment, claims. *Id.* at 157-159.

firmative duty to ensure a balanced presentation of competing viewpoints." *Pahls* v. *Thomas*, 718 F.3d 1210, 1239 (2013). Instead, respondents rely repeatedly on the premise that they were treated "differently *because of* their viewpoint." Br. in Opp. 24 (emphasis added); see *id.* at 9, 10, 11, 13, 22-23, 26, 27-28, 28. As discussed below, however, that premise is unavailable to them, because their allegations are insufficient to support the needed inference that the Secret Service agents here acted with any discriminatory purpose.

B. Respondents Have Not Adequately Pleaded The Discriminatory Motive Necessary For A Claim Of Intentional Viewpoint Discrimination

As the petition explained (at 21-28), respondents' conclusory allegations of discriminatory motive are insufficient to satisfy this Court's application of basic pleading standards in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). Respondents still point to nothing that would make their inference of unconstitutional motive other than "merely consistent with" the facts they allege. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557, 570).

1. Respondents contend that discriminatory intent is "persuasively demonstrate[d]" by "petitioners' decision to leave the President's supporters and the other unscreened guests and diners in place and within handgun and explosive range of the President." Br. in Opp. 27; see *id.* at 16-17. But the decisions to allow those other groups (*i.e.*, the pro-Bush group and the guests and diners already at the Inn) to remain in place are clearly susceptible to "more likely explanations" (*Iqbal*, 556 U.S. at 681) than invidious discrimination, especially when those decisions were made against the backdrop of a last-minute change in the President's plans. A large group of 200 to

300 people near the outdoor patio where the President was dining presented different security concerns than did the presence of a group (like the pro-Bush demonstrators) along the street where the President's motorcade would travel. And the other diners and guests were at the Inn before it was known that the President would dine there, and they were fewer in number than the crowd that had gathered in anticipation of seeing the President, which could—regardless of its political leanings or its apparently "peaceful" nature (Br. in Opp. 17)—provide cover for someone planning to do the President harm. See Pet. 22-23. The different treatment of those differently situated groups as the President's plans evolved provides no indication that the agents' asserted security-based rationale was pretextual or inconsistently applied.

2. Respondents also contend that their inference of discriminatory motive is "consistent with" or "in line with" their assumption that a Presidential Advance Manual and "twelve other instances during the first term of the Bush administration" demonstrate an unwritten Secret Service policy of "limit[ing] the President's exposure to dissenting views." Br. in Opp. 6, 11. Of course, as explained in the petition (Pet. 23-24) and by the eight dissenting judges below (Pet. App. 13a-15a), the manual and other alleged incidents do not involve similar circumstances (or the same agents) and do not show that there is any unwritten policy of discrimination. Moreover, even assuming there were other incidents involving viewpoint discrimination, respondents' contention that the conduct here was "consistent with" or "in line with" (Br. in Opp. 6, 11) such incidents could not suffice to allege illegal conduct under *Iqbal* and *Twombly*. See *Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the

line between possibility and plausibility of entitlement to relief.'") (quoting *Twombly*, 550 U.S. at 557) (some internal quotation marks omitted).[5]

3. Respondents also suggest (Br. in Opp. 11) that, in petitioners' view, "no plaintiff asserting a claim of viewpoint discrimination could survive a motion to dismiss unless the plaintiff could allege that the defendant announced his or her intention to discriminate." That is simply incorrect. Petitioners merely contend that a plaintiff must provide "specific, nonconclusory factual allegations" giving rise to a sound inference of unlawful motive. Pet. 27 (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998)). Here, for instance, respondents' allegation might have been plausible if local law-enforcement officers had said that the Secret Service agents invoked a discriminatory reason for moving the anti-Bush group (rather than the viewpoint-neutral justification they gave (Pet. 21-22)); or if the pro-Bush group had then been allowed to move into the nearer location that the anti-Bush group had vacated; or, perhaps, if the other incidents had involved the same agents and were similar in nature to the events here (as opposed to being primarily at ticketed events).

Respondents, however, have made no such specific allegations. Permitting their complaint to go forward will only make it even more difficult for defendants in the Ninth Circuit to defeat claims involving allegations of illegal motive at the motion-to-dismiss stage, notwith-

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[5] Respondents repeatedly suggest (Br. in Opp. 14-15, 17, 29) that petitioners attempt to raise a factual dispute that cannot be resolved on a motion to dismiss. But *Iqbal* disposed of a similar objection, explaining that "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law" and does not "implicate[]" the problem addressed in *Johnson* v. *Jones*, 515 U.S. 304 (1995). *Iqbal*, 556 U.S. at 674-675.

standing this Court's "repeated[]" emphasis on "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (citation omitted); see *Iqbal*, 556 U.S. at 685 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'") (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

C. The Decision Below Poses Threats To The Work Of The Secret Service And Warrants Review Or Summary Reversal

As explained in the petition (at 29-31), the decision below is not limited to the Secret Service context, but it poses particularly great risks to the Secret Service's work, which often requires agents to make on-the-spot decisions to safeguard the President (or other officials) in the presence of large groups of people and changing circumstances. Respondents say (Br. in Opp. 28) that the facts of this case involve "a considered, deliberate choice" rather than the "second-guessing [of] any split-second security determination by petitioners." But the agents were reacting to the President's last-minute decision to dine at the Inn, which dramatically changed the significance of the fact that there were already 200 to 300 people crowding that block. It cannot be the case, as respondents contend, that the agents' only constitutionally compliant options at that point were to "prevail[] upon the President not to dine at the Inn" or—in order to create a predicate for moving the crowd—to take additional steps to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President. Pet. 30 & n.8

(quoting recording of oral argument in the court of appeals).

Secret Service agents work throughout the Nation, and they should not, while in the Ninth Circuit, be distracted from their important security-related assessments by the threat of personal liability if they fail to ensure comparable proximity to public officials for various groups seeking to express competing views. See Pet. App. 22a-23a (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("[T]his decision hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability.").

This Court has previously acknowledged that qualified immunity plays an especially critical role in ensuring that Secret Service agents do not "'err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). In *Hunter*, the Court summarily reversed a Ninth Circuit decision that had erroneously denied qualified immunity to Secret Service agents. See *id.* at 227-229. Even outside the Secret Service context, the Court has repeatedly (and sometimes summarily) reversed the Ninth Circuit for denying qualified immunity based on rules of constitutional law "cast at a high level of generality." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); see *al-Kidd*, 131 S. Ct. at 2084 ("We have repeatedly told * * * the Ninth Circuit in particular * * * not to define clearly established law at a high level of generality."); *Saucier*, 533 U.S. at 200. And just last year, the Court reiterated the point in another Secret Service case (arising in the Tenth Circuit). *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012).

Under the circumstances of this case, the Court should not "let such a mistake stand with respect to those who guard the life of the President." *Hunter*, 502 U.S. at 229 (Scalia, J., concurring in the judgment). It should either grant plenary review or summarily reverse the decision below. If the Court chose the latter course, it would not need to "express any view" about the constitutionality of petitioners' alleged conduct; it could simply recognize that—as demonstrated by the dissent of eight judges—the purported illegality was not sufficiently "beyond debate" to render the agents "plainly incompetent." *Stanton* v. *Sims*, No. 12-1217 (Nov. 4, 2013) (per curiam), slip op. 8 (citations omitted).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. The Court may also wish to consider summary reversal of the court of appeals' judgment.

Respectfully submitted.

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